46. What are the greatest challenges to the Commission's ability to fulfill its mission and mandate? Each Commissioner is invited to answer this question separately.

Response of
Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter

In our view, one of the greatest challenges to the Federal Election Commission's ability to fulfill its mission and mandate is the common misperception that adherence to the rule of law and sensitivity to Americans' First Amendment rights reflect hostility towards enforcing the law or, even, towards the Commission itself. This misperception feeds into a false narrative of Commission "dysfunction" that undermines public confidence in the Commission's ability to administer and enforce campaign finance laws. It's high time to focus on facts instead of spurious statistics and real issues instead of mindless refrains.

The Commission is unique among federal agencies in that its core mission involves regulating political association and speech. Virtually everything that the Commission does — through regulations, enforcement actions, audits, litigation, disclosure, advisory opinions, and even education and outreach — has an impact on Americans' exercise of their First Amendment rights. For this reason, the Commission has, in the words of the D.C. Circuit Court of Appeals, a "unique prerogative to safeguard the First Amendment when implementing its congressional directives."[1] Consequently, a fair and bipartisan Commission that administers the laws as written by Congress and interpreted by the courts, while being respectful to the First Amendment, is vital to our democracy.

The Commission is an independent agency. By law, no more than three Commissioners may be affiliated with the same political party. And before the Commission can act to regulate, interpret, or enforce the law, at least four Commissioners must agree and vote in favor of the action. This structure ensures that no single political party or administration can dominate the Commission's decisionmaking, subpoena power, or rulemaking authority, and that no single viewpoint will automatically prevail.

As a result, and by design, members of the Commission reflect different views on the same difficult legal issues that often divide the American public, members of the judiciary, and Congress. Unfortunately, disagreements among Commissioners are often mischaracterized as "dysfunction," rather than accepted as a natural consequence of the Commission's unique structure and mandate.

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[1] *Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016) (citing *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003)).

We are particularly sensitive to the constitutional rights of Americans to speak and associate freely, and we understand that overly aggressive regulatory and enforcement actions could harm those rights. The Supreme Court has said, "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."[2] Thus, we should issue new regulations only when they are clearly necessary, and authorize investigations of Americans' political activities only upon a showing that the allegations against them are based on more than speculation and concern actions that, if proven, would be clearly prohibited. We administer and enforce the law as written by Congress and interpreted by the courts, not as others wish it to be.

While we welcome and encourage a meaningful debate on the weighty questions we must decide, we caution against overly simplistic attempts to evaluate Commission performance based on numbers with limited value. If numbers are to be considered, they must not mislead. Thus, a rational and fair-minded analysis of Commission actions based on the Commission's voting history must take into account the total universe of votes taken by the Commission. Focusing only on the number of "deadlocked" votes in Matters Under Review considered in Executive Session automatically limits the scope of such analysis to only the most complex and controversial enforcement cases. It necessarily excludes all votes in enforcement matters approved by Commissioners on tally, or handled through another mechanism — such as the thousands of matters resolved through the administrative fines program or the Office of Alternative Dispute Resolution — or dismissed under the Enforcement Priority System.

Moreover, the number of deadlocked votes does not correlate with the outcome of an enforcement action. Commissioners regularly call for votes on motions in Executive Session even when they expect the motions to fail; this can help to create a record of Commissioners' positions on issues, which not only is part of the normal give-and-take prior to reaching consensus but may also provide useful guidance to the public. Thus, a matter with deadlocked votes often reflects the opposite of dysfunction: Commissioners staking out their ideal positions while on the path to compromise.

Take for example MUR 7122 (American Pacific International Capital, Inc., *et al.*). In this matter, Commissioners made 13 different motions, more than half of which failed, before ultimately voting to approve conciliation agreements in which the respondents agreed to pay nearly $1,000,000 in fines. The deadlocked votes were a necessary part of the deliberative process that achieved a consensus result.

We do not mean to suggest that consensus is achieved in nearly every matter. But true deadlocks, in which at least four Commissioners cannot agree on a path forward, occur infrequently and reflect principled disagreements on the proper interpretation and application of the law. This exercise of independent judgment is generally far more challenging than simply

[2] *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 474 (2007).

adopting the recommendations of Commission staff — but it is a vital part of the work that we took an oath to perform. While we do not seek to dismiss the significance of disagreements over issues like express advocacy or political committee status, they should not overshadow the Commission's successes in promoting legal compliance and providing the public timely, robust access to the fundraising and spending activities of candidates, parties, and PACs.

For these reasons, attempts to assess Commission performance using statistical measures must take into account the full context in order to be meaningful data points for members of Congress, the public, and the media to use. Inaccurate or misleading numbers might produce tasty sound bites and good theater, but they will not help produce sound policy or law.

We thank the Committee for providing us an opportunity to respond to this important question about the Commission's mission.